G. B. Electric, Inc. *and* International Brotherhood of Electrical Workers Local 357, AFL–CIO. Case 28–CA–12604

November 13, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On July 24, 1995, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, G. B. Electric, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has not excepted to the judge's finding that Gary Hollis is a supervisor within the meaning of Sec. 2 (11) of the Act.

[2] In his recommended remedy, the judge finds that it would be appropriate for remedial purposes to presume that John Sneed's pay would have been increased to $12 per hour commencing the first pay period after Sneed informed the Respondent that he had attained the required credentials and tools. The credited record evidence described by the judge uniformly shows, however, that Sneed was told he would receive ''$12 to $14 an hour'' upon meeting such criteria. Accordingly, we will modify the remedy to provide that Sneed's pay would have been increased to an amount from $12 to $14 per hour, with the precise amount to be determined in compliance.

Debra J. Morgan, Esq., for the General Counsel.
Jim V. Fisher, President, American Labor Management Associates, of Las Vegas, Nevada, for the Respondent.
Patricia S. Waldeck, Esq., of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. The General Counsel alleges that G. B. Electric, Inc. (Company or Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by canceling scheduled work on May 27 and 30, 1994,[1] and by refusing to promote employee John Sneed to a journeyman electrician position in retaliation for its employees choice in a representation election. The General Counsel also alleges that Respondent independently violated Section 8(a)(1) when its agent Gary Hollis: (1) told employees that work had been canceled because they voted for representation by a labor organization; (2) told Sneed that he would not be promoted to a journeyman's position because employees voted for union representation; and (3) told employees that Respondent would go out of business rather than go union.

The International Brotherhood of Electrical Workers, Local Union 357, AFL–CIO (Local 357 or the Union) filed the charge in this case on June 24. On August 8, the Regional Director for Region 28 of the National Labor Relations Board (NLRB or the Board) issued the General Counsel's complaint and notice of hearing. Respondent's answer denies the unfair labor practices alleged.

I heard this case on March 30 and 31, 1995, at Las Vegas, Nevada. After considering the record, the demeanor of the witnesses while testifying, and the posthearing briefs of the General Counsel and the Respondent, I conclude Respondent violated the Act as alleged based on the following

FINDINGS OF FACT

I. RELEVANT EVIDENCE

A. *Jurisdiction and Background*

Respondent, an electrical contractor, maintains its office and place of business in Las Vegas, Nevada. During the 12-month period preceding this charge, Respondent's indirect inflow exceeded the Board's nonretail jurisdictional standard. Accordingly, the Board should exercise its jurisdiction to resolve this labor dispute.

Glen Brower is Respondent's president and principal owner. Danny Braswell, who also has an ownership interest in the Company, is Respondent's vice president. Gary Hollis, whose supervisory status is denied, is an electrician by trade but his company job title is ''Supervisor, Safety Director.'' All three have offices at the Company's Las Vegas headquarters. At times relevant to this case, Respondent employed eight electricians at four or five jobsites around the Las Vegas environs, including the Valley View Surgical Center (Valley View) construction project where Respondent served as the electrical subcontractor for W. P. Rowland Construction Corp. of Phoenix, Arizona, the general contractor. The Company classifies its skilled tradesmen as foremen, electricians, and apprentices.[2] In addition the Company employs helpers who perform general laborer work assisting its electrical employees. All electricians and their helpers are paid by the hour.

Brower generally oversees company operations, prepares job estimates, negotiates contracts, and approves all employ-

[1] If not otherwise shown, all further dates refer to the 1994 calendar year.

[2] For ease of reference, these tradesmen are individually and collectively referred to below as electricians except where their specific company classification may be of significance. No claim is made that Respondent's foremen are supervisors within the meaning of the Act.

ment policies and decisions. Braswell performs certain office duties and serves as a project manager from time to time. Hollis (who has 25 years of experience as an electrician) works primarily as salaried coordinator and expediter.

On a typical day, Hollis visits all jobsites to assess and collect information from the job foremen about needed materials, manpower, or special equipment. When he receives manpower requests, Hollis assesses the job requirements in consultation with the job foreman and then makes ''suggestions'' to Brower or Braswell about reassigning employees from other projects. According to Hollis, however, these two executives actually authorize all manpower moves. Nevertheless, no evidence shows that either Brower or Braswell independently investigate Hollis' ''suggestions.'' Both Brower and Braswell spend most of their worktime engaged in their office duties and spend only a few hours each week on the jobsites. In connection with evaluating employees, Brower testified that he relies on ''recommendations from . . . lower down'' which presumably includes Hollis. Moreover, Braswell testified that he relies on Hollis' assessment of employees and their capabilities.

Generally, Hollis works in his office until about 8:30 a.m. ordering material, checking timecards, reviewing the foremen's daily work reports for problems and irregularities, and preparing the following day's schedule. He then begins his jobsite visits. If Hollis observes an employee performing poorly while he on a job, he generally takes that person aside to ''have a talk with him'' unless the foreman provides an adequate excuse for the employee. Hollis later reports such instances to the ''office.'' Usually, he returns to his office around 2:30 or 3 p.m. to make any necessary telephone calls, order materials, and again go over the scheduling so, as he put it, ''[E]verybody is ready to go in the morning. They are not standing around waiting.''

In his role as the Company's safety director, Hollis schedules safety training and meetings, arranges for employees to attend special classes on matters such as first aid and the use of specialized tools, and inspects the jobs for safety hazards. When he observes hazardous conditions, Hollis promptly directs the job foreman to correct the matter. Later, he also calls such matters to the attention of Brower or Braswell.

As reflected more fully below, Brower eventually put Hollis in charge of the Valley View job purportedly to control its labor costs. When this occurred, Hollis spent approximately 80 percent of his time working with the tools of the trade. Normally, however, Hollis would only spend about 20 percent of his time engaged in the work of his trade and the remainder engaged in the above-described administrative duties. Even prior to this his Valley View assignment, Hollis once reprimanded the Valley View employees for wearing shorts but later ''backed off that one'' after he learned Brower had given them permission to do so while working on the roof. Sneed, a Valley View apprentice, acquired a perception that Job Foreman Mike Melendez ''generally deferred to [Hollis]'' whenever there were questions about running the job.

Notwithstanding Respondent's claims to the contrary, I find the record supports the conclusion that Hollis possesses and exercises authority to responsibly direct and discipline Respondent's employees, and that he makes effective recommendations concerning employees' terms and conditions of employment. The implications of Hollis' status is further reflected in the secondary evidence showing that, unlike other electricians, he is salaried, has an office at the Company's headquarters, and was not included among the employees eligible to vote in the NLRB election. For these reasons, I have concluded that Hollis is a supervisor and agent within the meaning of Section 2(11) and (13), as alleged.

B. *The Preelection Period*

The Union filed an NLRB representation petition in mid-April seeking to represent Respondent's electricians. Thereafter, Respondent and Local 357 entered into a Stipulated Election Agreement providing for a secret-ballot election on May 26. At that election, the employees voted 5 to 1 for union representation and the NLRB certified the Union on June 6.

The General Counsel adduced evidence concerning remarks about unionization by Brower during the course of preelection meetings held with the electricians. Sneed attended one meeting held on May 24 in the Company's office along with approximately seven other employees. Sneed claims that Brower, in general, emphasized that the Union would be ''detrimental to the Company and to the workers, [and] that it would just generally be a bad move.'' According to Sneed, Brower also denigrated individuals who chose to belong to unions and reiterated that the Company, as a ''merit shop,'' paid its employees according to ''their worth.'' Although Sneed asserts that Brower did not specifically state that the shop would be closed if the employees selected the Union, he testified that Brower implied as much by telling employees that ''he would never be union and [that] G.B. [Electric] would never be union.''

Electrician Dale Warren also attended the May 24 meeting. He claims that Brower stated that ''he knew what was best for his company, and he was not going to go union, but if [the employees] wanted to vote yes, then [they had] every right to vote yes.'' Warren added that Brower also told employees that ''he wasn't going to have any kind of different opinion about us whatever way it was going to go.'' Contrary to Sneed, however, Warren claims that Brower told the employees directly that ''he would close his doors before he ever went union.''

The last meeting before the election between Brower and the Valley View employees occurred at that jobsite during the lunch period on May 25. Foreman Melendez asserts that Brower was ''strongly'' opposed to the Union at this meeting. During one portion of the talk, Melendez recalled, Brower stated: ''No matter what, I will not go union'' and later remarked he ''could keep it going in litigation . . . for as long as it would take.'' Melendez was not questioned about any ''shop closing'' remarks by Brower.

Although Brower acknowledged that he held preelection meetings with employees and that he opposed unionization, he denied that he ever told the employees that he would close the shop if they chose to be represented. Braswell testified that he attended the meetings at the Company's offices and he denied that Brower told employees the shop might close. Hollis also testified that he attended these meetings and he too denied that Brower ever mentioned anything about closing the shop if the electricians voted for union representation. Clyde Sheldon, an electrician admittedly opposed

to the Union, claims that he ''never heard Mr. Brower threaten to close the shop at all.''[3]

C. *The Election Aftermath*

Six to eight days before the NLRB election, Valley View Foreman Melendez claims that he stopped at the company office to deliver his daily job report. On this occasion, Melendez asserts, Brower asked if he planned to work the crew on the Memorial Day holiday and Melendez responded affirmatively, citing the need to keep pace with the general contractor. Melendez claims that Brower asked for a list of employees who would be working and the materials they would need ''because that particular weekend the supply shops close.''

In the next few days, Melendez polled the crew to determine how many employees were willing to work Memorial Day. All except Brandon Lee, an apprentice, agreed to work. In addition, Melendez claims that he informed the general contractor's superintendent that the electrical crew intended to work on Memorial Day. Purportedly, the superintendent agreed that they could do so.

Sneed testified without contradiction that around Wednesday of the election week Hollis walked around the Valley View job telling employees that they would be working the following Monday, Memorial Day. When Melendez went to the Company's shop on Thursday, May 26, to vote in the NLRB election, he claims that he handed Brower the requested lists for Memorial Day work in Hollis' presence. Melendez testified that Brower briefly scanned the material list and stated: ''Fine. Okay. Good. We will get it out there.''

Brower emphatically denied that he had conversations with Melendez concerning arrangements for work on Memorial Day. In fact, he claims that he rarely talks with the job foremen and that such matters were within Hollis' province. Hollis claims that Melendez asked to work Memorial Day because he needed the money to meet his new truck payments and that he told Melendez he would ''check into it.'' In the meantime, Hollis asked Melendez to ''to see if he could find some guys that wanted to work . . . .''

According to Melendez, Brower's mood changed drastically on the morning after the NLRB election. He testified that Brower and Hollis arrived at the Valley View job at 6:30 a.m. as the crew was about to commence work. At that time Brower told Melendez in an angry tone of voice that since they ''went union'' he intended to do things ''by the book.'' Brower continued by telling Melendez that Hollis would be in charge of the job and that, henceforth ''[t]here was going to be no sneakers, no shorts, no nothing.''[4] Brower further added that he wanted to find out why the job was so delayed. In this connection, Melendez recalled that Brower mentioned something about the job being ''800 hours behind.'' Finally, Brower told Melendez that ''if [the crew] had anything to say to him, [they] had to do it through . . . Hollis.''[5]

Brower admits substantially all of this conversation and the fact that he was upset. However, he claims that he was upset because the job had used up practically all of the estimated man-hours and there was still a substantial portion of the contract work left to perform. According to Brower, this predicament had only been discovered recently because of a problem with the software used in tracking these matters. In addition, Brower said the was upset because Melendez had not enforced the OSHA rules concerning work attire and safety. When he was asked if he had told the employees to go through Hollis if they had anything to say to him, Brower testified:

> I told the employees at that point in time, that there was an election and everybody knew the results of the election, and they elected to have IBEW represent them in negotiations, so I don't expect anybody to come into my office asking for anything. I have lost that right. They have taken that away from me.

Although Hollis had no recollection of Brower being at the Valley View job that Friday morning, he recalled that he had ''walked the job'' with Brower sometime that week. According to Hollis, this onsite review led to Brower's concern about the amount of work which remained. This problem, Hollis testified, had been the subject of discussions among Brower, Braswell, Melendez, and himself over the course of the previous 2 or 3 weeks. According to Hollis, the Company maintained regular records tracking the comparison between estimated hours and actual hours at various stages of the Valley View project which reflected the problem.

Braswell did not testify about any cost overruns on the Valley View job. Melendez, however, asserted the matter had never been discussed with him until Brower referred to the job being ''800 hours behind'' that Friday morning. Seemingly, Melendez did not put much stock in this claim; when asked on cross-examination why he did not question Brower's assertion, he testified:

> I was just demoted. Why should I question him? I mean, if he was concerned about me running this job, he should have told me prior when he was one, two, three, four hundred hours behind. Why did he wait until 800 hours to notify me?

Later, at around 8:30 a.m. that morning, Lee, the apprentice, told Melendez that Hollis had informed him that the

[3] None of Brower's preelection nor postelection statements are alleged as independent 8(a)(1) violations. However, in her brief, counsel for the General Counsel seeks an 8(a)(1) finding based on employee testimony that Brower threatened to close if employees voted for representation. Although some dialogue concerning this matter occurred at the hearing, I am now of the view that I and counsel for the General Counsel may have confused each other as well as Respondent's representative. Be that as it may, the complaint was never amended to allege any independent 8(a)(1) conduct by Brower. In view of my other findings below, I find it unnecessary to consider Brower's preelection remarks as anything other than evidence of union animus since it would add nothing to the remedial order.

[4] Melendez testified that company policy prohibited workers from wearing shorts and sneakers for work but Brower permitted such attire when employees worked ''outside doing ground work.''

[5] In connection with his effort to obtain a pay increase, Sneed testified:

> Also, I had heard from Gary, Mike Melendez and several other people that Gary was the only person you were to speak to concerning Company matters. We were not supposed to go to the shop or try to contact the shop.

crew would work only half a day that day and would not work at all on Memorial Day. Surprised by this report, Melendez promptly sought out Hollis who confirmed Lee's story. By way of explanation, Hollis told Melendez: ''He [Brower] is pissed. You pissed him off. Mike, you of all people should know that he expected you to vote no on the Union.'' Hollis did not specifically deny Melendez' account of this exchange but he did recall that he told Melendez that Brower was ''pissed'' about the job being so far behind for the man-hours which had been expended.

Respondent admits that employees worked only half of the Friday, May 27 workday and did not work at all on Memorial Day. Brower testified that he made this decision sometime on Wednesday or Thursday morning. According to Brower, he based that decision on the following considerations: (1) the job ''was [already] in a hole of 800 hours''; (2) the general contractor and the other trades had no plans to work on Memorial Day; and (3) not all of Respondent's employees were willing to work on Memorial Day. Brower claims that he confirmed that the general contractor and the other trades on the job would not be working on Memorial Day and that, as far as Rowland's job superintendent was concerned, Respondent was on schedule. For these reasons, Brower said that he decided ''to give the employees—all the employees—an extended holiday.'' However, unlike past occasions when employees received long holiday weekends, they were not paid.[6]

Rowland, the general contractor, never planned to work on Memorial Day. In a prehearing affidavit furnished to the General Counsel, William Rowland, general contractor's president, stated that the heating and air conditioning contractor had planned to work on Memorial Day but did not because it failed to receive certain equipment. There is no evidence that Rowland or other subcontractors ceased work early on Friday, May 27.

Melendez claims that a couple of working days later as the employees and Hollis ate their lunch, he spoke to Hollis about Brower's beliefs concerning the Union. According to Melendez, Hollis responded, ''[y]ou should have known . . . he will never go union. He told me he would shut down the doors before he goes union.'' Sneed also recalled one occasion at lunch about a week after the NLRB election when Hollis stated: ''Glen [Brower] will shut the doors and close down the shop before he goes union.'' Hollis denied that the Union ever arose in the lunchtime discussions following the election.

D. *Sneed's Promotion*

Brower testified that he establishes each electrician's pay rate following a personal interview and his evaluation of the usefulness of the employee's experience to the Company's work. Thereafter, he increases the pay rates for employees whose work reflects quality performance, productivity, attendance, motivation, and consideration for the safety of other people. Unless a job is governed by prevailing wage regulations, the Company's electricians earn from $8 to $17 per hour.

Brower also testified that the Company maintains a recommended list of tools which the Company encourages, but does not insist, that all employees acquire. In addition, Braswell testified that officials in the county building permit office encourage all electrical contractors to have their employees obtain a certification issued by the National Assessment Institute (NAI) which reflects their level of knowledge in the trade.[7] For that reason, Braswell claims that he encourages all of the Company's electricians to obtain an NAI certification. According to Sneed, the NAI periodically conducts written examinations in the area and, in effect, issues a competence certification based on their examination score.

Brower hired Sneed as an apprentice electrician in November 1993 at $9 an hour and he worked for the Company until July 1994. Sneed testified that Brower said nothing at the time of his hire concerning the Company's policy about pay increases. Hollis characterized Sneed as ''a hard worker, [who] did a good job.'' In March, Sneed received a pay increase to $10 an hour. This raise, as it turned out, would be the only increase Sneed received before he left the Company in July.

Sneed testified that Braswell informed him of his March increase. Sneed claims that he engaged Braswell in a discussion at this time about company requirements for further increases. According to Sneed, Braswell showed him the tool list and explained that there could be little they could do until Sneed had all of the tools on the list and a ''Clark County Journeyman's Card,'' i.e., the NAI certification. Sneed claims that Braswell assured him that he ''would receive a pay raise to journeyman level'' which, as Braswell explained to Sneed, was $12 to $14 an hour ''as soon as [Sneed] got the journeyman's card and completed [the] tool list.'' According to Sneed, Braswell said nothing about any further evaluation.

For his part, Braswell claims to have no ''knowledge'' of speaking with Sneed at the time of his March increase and denied that he ever told Sneed that his pay would be increased to the journeyman rate if he received an NAI certificate. Nevertheless, following his March increase, Sneed set about to obtain the tools he needed and to take the NAI test. Thus, Sneed testified:

> So, I tried to comply with their request, in good faith. I asked for any kind of feedback on my performance or how I could improve or anything, and everything seemed to be going very well. So, I completed gathering the tool list together, which was a moderate expense, and I went and applied for the test and paid the fees and took the test. I had every confidence that after making all these efforts and my performance not dropping off or anything, that my pay raise would be concluded.

Later, at the May 24 company meeting concerning unionization, Sneed claims that Brower told the employees, in connection with explaining the Company's merit pay scheme, that ''journeymen electricians at [the Company] that had the required documents and tool list would receive $12 to $14 an hour.'' When pressed concerning Brower's precise statements, Sneed testified:

[6] Hollis, who has worked for the Company for about 3 years, recalled a couple of occasions in the past when employees received 4-day holiday weekends but on those occasions, he testified, employees were paid for both the Friday and the Monday holiday.

[7] The NAI certificate was also referred to throughout the record as the ''Clark County'' certificate.

Q. All right. Now, Mr. Brower also told you at one time that journeymen were paid between $12 and $14 an hour, is that correct?

MR. FISHER: Object. It is a leading question.

MS. WALDECK: That is what he testified to earlier.

JUDGE SCHMIDT: I am going to overrule that. Go ahead.

THE WITNESS: Yes, he did not specifically address that to myself. It was at a meeting, and he addressed it to the group.

Q. BY MS. WALDECK: All right. Did he also mention the license and the tools?

A. Yes, he did.

Q. And what did he say about them?

A. He said—it was in the midst of a statement about a merit shop and the positive points of it. ''If you have this tool list and the Clark County card, journeymen here make $12 to $14 an hour.''

Q. Did he suggest that once you got those tools and got the license, you would then be evaluated and maybe you would get the journeyman's pay or did he say you would get the journeyman's pay if you have those two things?

A. He did not specify it in those exact words. He said, ''If you have the tool list and the Clark County card, journeymen here make $12 to $14 an hour.''

On approximately June 2, Sneed received NAI's journeyman's certification based on his examination result. Immediately after receiving the certification, Sneed approached Hollis during a workbreak, showed him his journeyman's certificate and mentioned the previous information that he had received about a pay increase to the journeyman's rate. According to Sneed, Hollis stated that he ''didn't have a snowball's chance in hell of getting a raise after the election went against [Brower].'' However, Sneed persisted and Hollis finally suggested that he call Brower.

Following Hollis' suggestion, Sneed telephoned the Company from the general contractor's job office and asked the Company's receptionist to speak with Brower. After she apparently spoke with Brower, she returned to the phone and told Sneed that Brower was not able to speak with him.

After this rebuff, Sneed again approached Hollis and reported that Brower apparently was unwilling to speak with him. While Sneed spoke with Hollis at this time, Brower radioed Hollis. Sneed, who overheard the ensuing Brower-Hollis exchange, described it in the following manner:

> At that point, Gary [Hollis], who was carrying a radio on his hip, got a call from Glen [Brower], and Glen was asking why I was trying to contact him and had said something like, ''What is he doing on my time doing that?'' And Gary responded that it was break.
>
> Anyway, he said something to the effect of everything that I need to talk to anyone about I can talk to Gary. And Gary said, ''Well, he is looking for a raise because he got his journeyman's card.'' Glen responded that, ''He can go talk to 357 if he is interested in a raise,'' indicating the Union. So, that basically terminated the conversation. I think there might have been some last farewell words.
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> Then, I spoke to Gary, and he said he would relay the information, but he was almost laughing about it after all that we had gone through. But I felt obliged, after going through the efforts and everything, to go through the official channels and speak to Gary. So, that is where I left it.

Brower did not specifically address the remarks Sneed attributed to him at the May 24 meeting. Hollis recalled that Sneed spoke to him following the election about his new journeyman's card and that he asked for a raise. Hollis testified that he told Sneed that he ''would take it to the office and talk to him about it. It wasn't up to me to give raises.'' Brower, however, vaguely recalled the radio exchange. Thus, he testified:

> Q. Did Mr. Hollis approach you after the NLRB conducted representation election about Mr. Sneed's desire to get a raise and to obtain journeyman status?
>
> A. I kind of—I am trying to think of—on a radio there was a conversation that Mr. Sneed was asking for a raise. He didn't come to me directly. I think, if I recall, there was a radio conversation. I wasn't on the site. I was off the site at the time. I think Mr. Sneed brought that up, and I kind of remember that it was true—he did ask for a raise, and my comments were that, ''I have no right to do that. He elected the IBEW. He must go to 357. Now we are into negotiations. I cannot take one employee and give him something without giving the—I don't even have the—I can't do that anymore. They voted me—that away from me.'' That is the way I understood it. Maybe I am wrong.

II. FURTHER FINDINGS AND CONCLUSIONS

In reaching the conclusions detailed below, I have credited the accounts of the General Counsel's witnesses where there are conflicts between them and the Respondent's witnesses. My conclusions concerning credibility rest, in the main, on the fact that Respondent's witnesses fundamentally corroborated General Counsel's witnesses on certain critical events, e.g., the radio exchange between Brower and Hollis over Sneed's pay and Brower's remarks to Melendez on the morning of Friday, May 27. In other instances, Respondent's witnesses failed to deny important assertions by General Counsel's witnesses, e.g., Sneed's claim that Hollis informed the Valley View employees around Wednesday that they would be working on Memorial Day. On yet other matters, the conduct of General Counsel's witnesses exhibits a degree of inherent plausibility strongly supporting their stories. For example, Sneed's efforts to take the NAI test and buy tools following his pay increase in March strongly suggests that his account of his conversation with Braswell occurred as he related it. On the other hand, important portions of Respondent's defense reflects inconsistent accounts. Thus, Brower's assertion that the purported labor cost problem on the Valley View job was only recently discovered because of a software problem seemingly is not supported by Hollis who asserted—contrary to Melendez—that the matter had been known and discussed for 2 or 3 weeks by all involved. Similarly, Hollis directly contradicted Brower's attempt to pin the blame on Melendez for the employee's attire on the Valley View job.

A. *The 8(a)(1) Allegations*

Section 7 of the Act guarantees employees the right ''to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective-bargaining or other mutual aid and protection . . . .'' Section 8(a)(1) prohibits employer interference, restraint, or coercion of employees in the exercise of the Section 7 rights guaranteed under the Act. Verbal threats of reprisal or promises of benefit which fall outside of the ''free speech'' guarantee in Section 8(c) of the Act commonly run afoul of the 8(a)(1) prohibition. The specific activities called into play by the 8(a)(1) allegations in this case all concern Hollis' postelection remarks.

I have concluded that the General Counsel has sustained the complaint's 8(a)(1) allegations. Complaint paragraph 6(a) alleges that Hollis told employees that work scheduled for May 27 and 30 had been canceled because employees voted in favor of the Union. As detailed above, Hollis, in response to Melendez' inquiry concerning the cancellation of work, responded, in effect, that it was due to the fact that Melendez had ''pissed'' Brower off by voting for the Union. I find this remark is unquestionably coercive.

Complaint paragraph 6(b) alleges that Hollis told an employee that he would not be promoted to, nor paid as, a journeyman because employees had voted for the Union. Hollis' ''snowball's chance in hell'' remark to Sneed's inquiry about his becoming a journeyman fully supports this allegation. As the remark reflects that no consideration would be given to Sneed's request ''after the election went against [Brower],'' I find it is likewise coercive.

Complaint paragraph 6(c) alleges that Hollis told employees that Respondent would go out of business rather than ''go union.'' This allegation is supported by the credited testimony of both Melendez and Sneed that Hollis made such a remark during the course of a lunch conversation during the week following the election. I find this remark is also coercive as it lacks any semblance of a prediction about the likely business consequences of unionization and occurred at a time when employees could reasonably expect their newly elected representative to press for the fruits of collective bargaining by negotiating an agreement with their employer.

B. *The 8(a)(3) Allegations*

Section 8(a)(3) prohibits employers from discriminating in regard to an employee's ''tenure of employment . . . to encourage or discourage membership in any labor organization.'' As 8(a)(3) cases generally turn on the question of employer motivation, the Board and the courts employ a causation test to analyze the merits of such allegations. *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). See also *NLRB v. Sea-Land Service*, 837 F.2d 1387 (5th Cir. 1988).

The *Wright Line* test requires the General Counsel to make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action. Typically, the General Counsel meets this burden by presenting credible evidence showing a reasonable proximity in time between the adverse action in question and the employer's knowledge of, and hostility toward, the employee's protected activity. *Best Plumbing Supply*, 310 NLRB 143 (1993).

If the General Counsel establishes a prima facie case, the employer must then shoulder the burden of persuading the trier of fact by a preponderance of the evidence that the same adverse action would have been taken even in the absence of the employees' protected activity. *Best Plumbing Supply*, supra. To meet this burden ''an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.'' *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984).

Together, complaint paragraphs 5(a), (b), and (d) allege that Respondent canceled scheduled work on May 27 and 30 because employees engaged in union activity and to discourage those activities.[8] I find General Counsel established a strong prime facie case in support of this allegation. Thus, the credited testimony of Melendez concerning his two conversations with Brower about scheduling of work for May 30 and Sneed's credited testimony concerning Hollis' statements to employees in midweek that they would be working on May 30 establish that a decision had been made to work that day. Thereafter, Hollis' response to Melendez when the latter inquired on May 27 about the reason for canceling work scheduled for the remainder of May 27 and 30 amounts to direct evidence that Respondent's action was motivated by the NLRB election results. In addition, the timing and abruptness of Respondent's announcement lends further support for the conclusion that this work was canceled for unlawful reasons especially where, as here, Respondent never previously discussed shortening the May 27 workday at all.

In contrast, I find Respondent's defense unconvincing. Thus, its assertions that the Valley View job was ''800 hours in the hole'' at this time is based entirely on the assertions of Brower and Hollis which are fundamentally conflicting as to the discovery of the alleged cost overruns on that job. If, as Hollis asserted, Respondent maintained records which track estimated hours against actual hours at regular intervals on its projects, the introduction of those records would have provided Respondent's defense with a more convincing character. However, Respondent neither introduced those records nor explained their absence. In addition, to the extent that Respondent claims that it was precluded from working on the project because the general contractor did not plan to be present on Memorial Day, that argument is undercut by Rowland's statement, which Respondent introduced, indicating that another subcontractor had planned to work that day. Moreover, Respondent's disingenuous attempt at the hearing to characterize this action as an employee benefit was completely unpersuasive. Accordingly, I find that Respondent failed to sustain the burden required by *Wright Line*, supra, and conclude that it violated Section 8(a)(1) and (3) of the Act by canceling scheduled work on May 27 and 30 as alleged in the complaint.

Complaint paragraphs 5(c) and (d) allege that Respondent refused to promote Sneed because of the employees union activity and to discourage that activity. Again, I find the General Counsel has established the requisite prime facie

[8] Complaint par. 5(a) inadvertently refers to the cancellation of work on May 26. It is clear this reference should be to May 27.

case. Sneed's credible testimony concerning his March conversation with Braswell and Brower's statements at the May 24 employee meeting are sufficient to establish that Respondent maintained a policy of promoting apprentices to electricians if they obtained an NAI journeyman's certificate and possessed the requisite tools. However, after Sneed met both of those qualifying factors, Respondent refused to consider him for promotion because, as the radio exchange and Brower's admission reflect, the employees had selected a bargaining representative. I find Respondent's later claims that Sneed was still unqualified and undependable to be self-serving afterthoughts which are at odds with its announced objective criteria and completely unconvincing especially where, as here, Respondent never discussed these matters with Sneed either before or at the time of his promotion request. Accordingly, I conclude that Respondent violated Section 8(a)(1) and (3), as alleged, by refusing to promote Sneed after he attained Respondent's standard for promotion.[9]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling an employee that it would close the shop rather than go union; that work scheduled for May 27 and 30 had been canceled because employees voted in favor of the Union in an NLRB election; and that an employee would not be promoted because the employees voted for the Union in an NLRB election, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By canceling work scheduled at the Valley View job on May 27 and 30, and by refusing to promote John Sneed, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. The unfair labor practices of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, the recommended Order requires Respondent to cease and desist therefrom and to take the following affirmative action designed to effectuate the policies of the Act.

The recommended Order herein will require Respondent to reimburse employees for the pay lost by reason of the abrupt and discriminatory cancellation of work on May 27 and 30. In addition, the recommended Order requires Respondent to reimburse John Sneed for the pay lost by him as a result of its discriminatory refusal to promote him from an apprentice to an electrician's position and compensate him accordingly. In this connection, I deem Brower's statement at the May 24 meeting with employees as recounted by Sneed to accurately reflect Respondent's policy concerning the promotion of apprentices to journeymen. As Sneed met all objective criteria, I find that it would be appropriate for remedial purposes to presume that his pay would have been increased to $12 per hour commencing the first pay period after Sneed informed Respondent that he had attained the required credentials and tools. Backpay shall be computed in accord with *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Finally, Respondent will be required to post the attached notice in order to inform employees of their rights and the outcome of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, G. B. Electric, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Canceling scheduled work in order to discourage its employees' membership in, and activities on behalf of, International Brotherhood of Electrical Workers, Local 357, AFL–CIO.

(b) Refusing to promote its apprentices to electrician positions in order to discourage their membership in, and activities on behalf of, International Brotherhood of Electrical Workers, Local 357, AFL–CIO.

(c) Informing its employees that scheduled work had been canceled because they voted for representation by, International Brotherhood of Electrical Workers, Local 357, AFL–CIO.

(d) Telling its employees that Respondent's owners would close the business before going union.

(e) Telling its apprentice employees that they have no chance for promotion to an electrician's position because the employees selected International Brotherhood of Electrical Workers, Local 357, AFL–CIO, to represent them.

(f) In any like or related manner interfering with, restraining, coercing, or discriminating against employees because they exercise rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make employees whole, with interest, for the loss of pay suffered by them by reason of its cancellation of scheduled work on May 27 and 30, 1994, as specified in the remedy section of this decision.

(b) Make John Sneed whole for its refusal promote him to an electrician's position after he met the objective criteria for that position as specified in the remedy section of the administrative law judge's decision in this matter.

[9] Where, as here, I have concluded that Respondent maintained a policy of promoting apprentices who acquire the required NAI journeyman's certification and the listed tools, Respondent's refusal to apply that policy to Sneed because the employees had selected as bargaining representative is arguably ''inherently destructive'' of employee rights so that no proof of discriminatory motive is required. *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967); *Henry Vogt Machine*, 251 NLRB 363 (1980). However, I find it unnecessary to consider that question as there is ample evidence of Respondent's discriminatory motive in view of the other 8(a)(1) and (3) violations.

[10] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes. Any pending motions inconsistent with this Order are denied.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the backpay due under the terms of this Order.

(d) Post at its Las Vegas, Nevada office and area jobsites copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT tell employees that we will close the business because they selected International Brotherhood of Electrical Workers, Local 357, AFL–CIO to represent employees for collective bargaining.

WE WILL NOT tell employees that scheduled work has been canceled because they selected Local 357 to represent them.

WE WILL NOT tell apprentice employees that they will not be promoted to a full electrician's position because our employees selected Local 357 to represent them.

WE WILL make John Sneed whole, with interest required by law, for our failure to promote him to a full electrician's position on or about June 2, 1994.

WE WILL make employees whole, with interest required by law, because we canceled scheduled work on May 27 and 30, 1994.

G. B. ELECTRIC, INC.